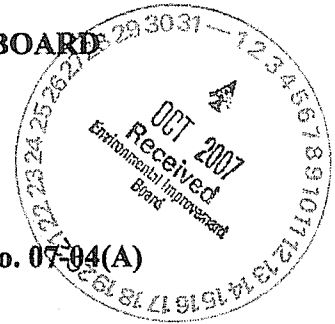


**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF:
Petition for Hearing on
Air Quality Permit No. 3434,**

**Western Water and Power Production Limited LLC,
Petitioner**

Case No. 07-04(A)



**ORDER AND STATEMENT OF REASONS
FOR GRANTING PERMIT WITH MODIFICATIONS**

THIS MATTER comes before the New Mexico Environmental Improvement Board (“Board”) upon an appeal petition filed by Western Water and Power Production LLC (“WWPP” or “Petitioner”) contesting the denial of air quality permit application. A public hearing was held in Moriarty, New Mexico on August 20-21, 2007. The Board heard technical testimony from WWPP and the New Mexico Environment Department (“NMED”) and non-technical testimony from Forest Guardians and other citizens and admitted exhibits into the record. On September 10, 2007, the Board deliberated and voted unanimously to grant the permit with six modifications for the reasons that follow.

I. STATEMENT OF REASONS

1. WWPP sought approval to construct and operate a thirty-five megawatt biomass power generation plant (“Estancia project”) to be located on a fifty-acre property on State Road 542, approximately six miles south of Estancia in Torrance County, New Mexico.

2. The matter was heard by NMED Hearing Officer Felicia Orth in Estancia, New Mexico March 13 and April 10, 2007.
3. NMED Secretary Ron Curry issued a "Final Order" denying the application on Air Quality Permit No. 3434 on May 22, 2007.
4. The Order stated: "The Secretary hereby DENIES the permit application for the reason that the record lacks support for the determination that the facility is not subject to 20.2.74 NMAC-Prevention of Significant Deterioration, based solely on its use of natural gas to start the boiler."
5. The Order stated: "The plant will burn natural gas for up to 8 hours each time it starts up. Natural gas is a fossil fuel, and thus the plant appears to be a listed PSD source under 20.2.74.501.F, fossil fuel boilers (or combinations thereof) totaling more than 250 BTU/hr heat input; and 20.2.74.7.AF, "major stationary source," as a stationary source listed in Section 501 that emits or has the potential to emit emissions equal to or greater than 100 tons per year of any regulated new source review pollutant."
6. The Order stated: "More information concerning source review coordination is necessary. Without the information required under 20.2.74, no permit can be issued."
7. WWPP filed a "Motion for Expedited Reconsideration, or in the Alternative for Reopening the Proceedings to Consider the Offer of Proof and Supporting Legal Authority" on June 4, 2007. NMED Secretary Curry did not issue an Order on this Motion.
8. WWPP filed a Petition for Appeal on June 20, 2007.
9. Board Hearing Officer Greg Green filed a Scheduling Order on July 17, 2007.

10. It stated that: "The scope of the hearing will be Petitioner's allegation that: (a) the permit is not subject to PSD regulation and (b) the Department Secretary acted arbitrarily and capriciously in rendering his order."
11. NMED filed its Response to Petition for Appeal on July 20, 2007.
12. Notice of Hearing was published in the Mountain View Telegraph on July 26, 2007 in English and Spanish.
13. Hearing Officer Green issued an "Order Granting in Part and Denying in Part Petitioner's Motion to Allow Discovery" on August 2, 2007.
14. WWPP filed a Notice of Intent to Present Technical Testimony on August 3, 2007.
15. NMED filed a Notice of Intent to Present Technical Testimony on August 3, 2007.
16. A hearing was convened in this matter on August 20-21, 2007 in Moriarty, New Mexico.
17. Mr. Gary McCutchen, RTP Environmental, Mr. Jack Maddox, Vice President of WWPP, Mr. Charles Tyburk, consultant, and Mr. Ralph Williams, Class One Technical Services, provided oral and written testimony at the hearing in support of the petition.
18. Mr. McCutchen's testimony established that if a plant will be emitting a listed source at greater than 100 tons per year ("TPY"), then the plant must apply for a PSD permit.
19. His testimony further established that fossil fuels are considered a listed source when they burn at greater than 250 MMBtu/hr.
20. His testimony further established that the fossil fuel at the Estancia Project would only burn at 175 MMBtu/hr.
21. Mr. McCutchen's testimony established that if a plant will be emitting a non-listed source at greater than 250 TPY, then the plant must apply for a PSD permit.

22. His testimony further established that the Estancia Project's permit does not allow an emission above the 250 TPY category.
23. Mr. McCutchen's testimony established that if a plant will be emitting a non-listed source at greater than 100 TPY but less than 250 TPY, then the plant does not have to apply for a PSD permit.
24. His testimony further established that Petitioner does not need to seek a PSD permit because the Estancia Project will emit between 100 TPY and 250 TPY.
25. His testimony further established that Petitioner does not need to seek a PSD permit for three reasons: (a) the primary source at the plant (wood) is not a listed source and (b) he did not consider wood as a fossil fuel; and (c) his view that the United States Environmental Protection Agency ("EPA") has a ten percent threshold (i.e. the fossil fuel used here will be 0.01% of the total).
26. Mr. Maddox's testimony established the following: (a) he was involved in the Raton Biomass Power Project and NMED issued its air permit on March 15, 2004; (b) the Estancia Project is identical in size and technology as the Raton Project; (c) the Raton Project used natural gas for start-up; (d) using natural gas for start-up is a common practice for biomass power plants in the United States and throughout the world; and (e) natural gas will only be used for start-up and flame stabilization in the Estancia Project.
27. It further established that NMED staff testified in front of NMED Hearing Officer Orth in March and April hearings and to EPA in a May 15, 2007 letter that PSD does not apply to the Estancia Project.
28. His testimony further established that he concluded based on his experience that WWPP would be using the Best Available Control Technology ("BACT").

29. Mr. Tyburk's testimony established that burning natural gas is cleaner than burning wood or biodiesel.
30. Mr. Williams' testimony established that emission rates for natural gas is less than emission rates used for biomass combustion and therefore natural gas use as provided in the permit would not increase overall permitted facility emissions. See Petitioner's Exhibit 4.
31. Mr. Richard Goodyear, NMED Manager of Permit Program for the Air Quality Bureau, and Ms. Felicia Orth, NMED Hearing Officer, provided oral and written testimony at the hearing. The Board did not require Mr. Goodyear to read verbatim from his pre-filed written testimony, but his direct examination and cross-examination sufficiently elicited the substance of his testimony.
32. His testimony established that he interpreted EPA's August 2 email to NMED and his August 3 telephone call with EPA to mean that if the firing rate of the boiler was greater than 250 MMBtu/hr, then the permittee needed to seek a PSD permit and additional public hearings would be needed.
33. His testimony established that the figure of 175 MMBtu/hr was new information and was not in front of the Hearing Officer Orth or part of NMED Secretary Curry's review.
34. Ms. Orth's testimony established that NMED Secretary Curry's review of the permit included a variety of issues and he only had problem with the PSD matter.
35. Ms. Orth's testimony established that after listening to the August 20-21 public hearing, the record was now sufficient.
36. The Board has authority to modify a petition because "even substantive changes in the original plan may be made so long as they are in character with the original scheme and a

logical outgrowth of the notice and comment already given.” BASF Wyandotte Corp., et al. v. Costle, 598 F. 2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1086 (1980).

37. Mr. Goodyear recommended four modifications to the permit on the second day of the hearing.
38. In Section 1.o: “The design capacity of the natural gas burners installed in the Fluidized Bed Combustion Boiler shall not exceed 175 MMBtu/hr. The actual use of natural gas in the Fluidized Bed Combustion Boiler shall not exceed 0.184 MMscf/hr, which considers the range of heat content of pipeline quality natural gas of 950 to 1100 Btu/scf.”
39. In Section 3.o: “Using the flow meter installed in the natural gas supply line, the permittee shall monitor on a continuous basis the natural gas used by the Fluidized Bed Combustion Boiler at any time during startup periods and regular operation.”
40. In Section 4.p: “Record the cumulative flow of natural gas to the Fluidized Bed Combustion Boiler at least once every 60 minutes during boiler operation.”
41. In Section 5.i: “Report to the Department every six months all instances when records required by condition 4.p exceed the limitation on flow rate in condition 1.o.”
42. The parties stipulated to these modifications after listening to testimony during the first day of the public hearing. The modifications provided clarity to requirements in the permit.
43. The modifications were printed as hand-outs for distribution at the public hearing. The public was allowed to make public comment on the second day of the hearing and file post-hearing written comments on these four conditions. The Board reviewed this comments prior to commencing its deliberations.

44. Forest Guardians offered another modification to the permit at the hearing. In Section 1.p: “Any proposed change in fuel type from that expressly authorized in this permit, including any use of natural gas other than for plant start up for scheduled maintenance, shall be considered a significant permit revision under 20.2.72.219(D).”
45. The parties did not object to the substance of this modification, but argued that it was understood within the permit and might be redundant.
46. The Board concluded that the permitting of biomass companies is relatively new in New Mexico and it was helpful to memorialize this understanding within Section 1.p. The language also provided a clarifying safety value in case of future dispute on this issue.
47. The Board concluded that it was necessary memorialize in the preamble of the permit that the Petitioner had agreed to abide by forest principles. Petitioner’s counsel stipulated to this statement during the hearing.
48. The Board concluded it was important to have a reference to a standard practice on this issue.
49. The Board also concluded that biomass companies were part of the arsenal of tools in new energy technologies and had the potential to become an important local energy source. Yet, the Board asked federal and state agencies to work together to ensure a holistic approach is taken to ensure environmental improvement and protection.
50. In accord with Colonias Development Council v. Rhino Environmental Services, Inc., 138 N.M. 133 (2005), the Board heard public testimony regarding the social well-being and potential impact on the quality of life of the community. There was public testimony in favor of the permit regarding economic development and job creation. There was public testimony against the permit expressing concern that some of the air quality levels

within the permit – while within permissible limits - were at the high end of the permissible limits and thus posed a potential adverse impact on quality of life.

II. ORDER

By a unanimous vote, the permit with six modifications was approved on September 10, 2007. NMED staff is instructed to modify the permit in conformance with this Order.


On behalf of the Board

Dated: 10-2-07

NMSA 1978, Section 74-2-9-Judicial review; administrative actions

A. Any person adversely affected by an administrative action taken by the environmental improvement board, the local board, the secretary or the director may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action.

B. For appeals of regulations, the date of the action shall be the date of the filing of the regulation by the environmental improvement board or the local board pursuant to the State Rules Act.

C. Upon appeal, the court of appeals shall set aside the action only if found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

D. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

- (1) by the environmental improvement board, the local board, the department or the local agency, whichever took the action being appealed; or
- (2) by the court of appeals if the environmental improvement board, the local board, the department or the local agency denies a stay or fails to act upon an application for a stay within sixty days after receipt of the application.